

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

HAROLD R. SHERRELL
PATRICIA A. SHERRELL

CASE NO. 89-00255

Debtors

HAROLD R. SHERRELL
PATRICIA A. SHERRELL

Plaintiffs

vs.

ADV. PRO. NO. 93-70031

FLEET BANK OF NEW YORK, NORSTAR
BANK OF NEW YORK, SHELDON G.
KALL, EMC MORTGAGE CORP. and
CITIBANK OF NEW YORK STATE

Defendants

APPEARANCES:

HAROLD R. SHERRELL
PRO SE
55 Bayberry Circle
Liverpool, New York 13090

COSTELLO, COONEY & FEARON, ESQS.
Attorneys for Fleet Bank of N.Y.
205 South Salina Street
Syracuse, New York 13202

MICHAEL RELIGA, ESQ.

MARTIN, MARTIN & WOODARD, ESQS.
Attorneys for Citibank
One Lincoln Center
Syracuse, new York 13202

DAVID CAPRIOTTI, ESQ.

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Fleet Bank of New York/Norstar Bank of New York
("Fleet/Norstar") has moved for summary judgment in this adversary
proceeding pursuant to Federal Rule of Bankruptcy Procedure

("Fed.R.Bankr.P.") 7056, which incorporates by reference Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 56; in the alternative Fleet/Norstar seeks to amend its Answer pursuant to Fed.R.Bankr.P. 7015, which incorporates by reference Fed.R. Civ.P. 15. The motion is opposed by the Plaintiffs/Debtors ("Debtors") who are maintaining the adversary proceeding in a pro se capacity.

The Court heard oral argument on the motion at its motion term in Syracuse, New York, on April 4, 1995, and the matter was then submitted for decision.

FACTUAL FINDINGS

The Debtors filed a voluntary petition pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code") on February 15, 1989. Debtors own two parcels of real property known as 55 Bayberry Circle, Liverpool, New York, their residence ("Residence"), and 7211 Oswego Road, Liverpool, New York, now or formerly utilized by the Debtors as a day care center ("Day Care Center").

The instant motion is only addressed to Debtors' cause of action based on a Fleet/Norstar obligation and mortgage which is secured by the Day Care Center ("commercial loan").

On March 1, 1993, Debtors then represented by counsel, commenced this adversary proceeding by filing a complaint, essentially alleging three causes of action. While the adversary proceeding was pending, Debtors' Chapter 11 case was converted to one pursuant to Chapter 7 and certain other events, not relevant

here, rendered Debtors' Complaint essentially moot.

On February 17, 1994, the Debtors, having previously discharged their counsel and proceeding pro se, filed a motion seeking, inter alia, to amend their Complaint by adding new causes of action against Fleet/Norstar emanating generally from an alleged violation of the Federal Truth in Lending Act ("TILA"), in regard to the interest rate being charged on the commercial loan mortgage encumbering the Day Care Center property.¹ Debtors also sought to assert a cause of action against Fleet/Norstar and its attorneys on the residential mortgage, claiming that the attorneys diverted portions of Debtors' mortgage payments, thus causing a default on that mortgage.

The Court on July 7, 1994, issued a Memorandum-Decision, Findings of Fact, Conclusion of Law and Order ("July 7th Order") in which it concluded that by virtue of the conversion of Debtors' case from Chapter 11 to Chapter 7, the causes of action Debtors sought to assert in the proposed amended complaint might very well constitute assets of the Debtors' estate subject to being administered by the Chapter 7 Trustee. Accordingly, the Court denied the motion to amend without prejudice and directed the Debtor to serve the July 7th Order on the Chapter 7 Trustee, and further directed the Chapter 7 Trustee to either intervene in the adversary proceeding or abandon the causes of action being asserted by Debtors.

¹ Debtors' basic dispute with Fleet/Norstar regarding the Day Care Center mortgage centers on the bank's alleged failure to adjust the interest rate on what Debtors contend was a variable rate mortgage.

Thereafter, and in the absence of any compliance by the Chapter 7 Trustee with the July 7th Order, Debtors again filed a motion on September 7, 1994, seeking to amend their Complaint. Following several adjournments, the Court on November 15, 1994 permitted Debtors to amend their Complaint. In the interim, however, the Chapter 7 Trustee, on October 26, 1994, filed a notice of proposed abandonment of the alleged claims being asserted by Debtors against Fleet/Norstar as well as Citibank of New York State in the proposed amended complaint, and by Order dated November 17, 1994, the Court granted the Chapter 7 Trustee's request for an abandonment of all such claims.

Debtors thereafter served their amended complaint and the Defendants, Fleet/Norstar and Citibank of New York State, filed and served their amended answers.² Subsequently, on March 13, 1995 Fleet/Norstar, through its attorneys Costello, Cooney & Fearon, filed the instant motion for summary judgment.

DISCUSSION

Before considering the merits of the summary judgment motion, the Court believes that it must consider, sua sponte, whether or not it has subject matter jurisdiction of this adversary proceeding.

Clearly, 28 U.S.C. §§1334 (b) and 157(a) provide a subject matter jurisdictional basis to a bankruptcy court which is

² The Answers filed by Fleet/Norstar and Citibank failed to raise the issue of subject matter jurisdiction.

further sub-divided into core (28 U.S.C. §157(a)) and non core or "related to" jurisdiction (28 U.S.C. §157(c)). Unless a bankruptcy court can find a jurisdictional basis in §157(b) or (c), it has none. In that regard, it is of little consequence that none of the Answers to the amended Complaint filed in this adversary proceeding raise a lack of subject matter jurisdiction and, therefore, arguably have waived it, since subject matter jurisdiction cannot be waived. See In re Conway, 1994 WL 617253 (Bankr. E.D.Cal.). Further, the case law is clear that a bankruptcy court may, sua sponte, raise a lack of subject matter jurisdiction even though the Court may have previously exercised subject matter jurisdiction over that adversary proceeding. See Tschirn v. Secor Bank, 123 B.R. 215 (Bankr. E.D.La. 1991); In re Anderson, 129 B.R. 44, 47 (Bankr. E.D.Pa. 1991); In re Israel, 112 B.R. 481, 483 (Bankr. D.Conn. 1990); .

There can be little dispute that had the Trustee moved to intervene in the adversary proceeding as a party plaintiff in accordance with the Court's July 7th Order, such intervention would arguably have given the Court subject matter jurisdiction since the outcome of the adversary proceeding would then have directly impacted on the Debtors' Chapter 7 estate. The Trustee's abandonment of all claims of the Debtors against Fleet/Norstar and Citibank New York State by virtue of the Order dated November 17, 1994, leaves no doubt, however, that this Court was divested of all jurisdiction over the adversary proceeding. See Perry v. First Nat'l Bank of Jefferson, 1993 WL 310490 (E.D.La.); Conway, supra; In re Grossinger's Associates, 184 B.R. 429, 432 (Bankr. S.D.N.Y.

1995).

As Bankruptcy Judge Alan H.W. Shiff observed in In re Israel, supra, 112 B.R. at 484,

"An adversary proceeding may be characterized as related to a bankruptcy case when its outcome could conceivably have an effect on the administration of the estate, i.e. where the proceeding would affect the distribution to creditors E.g. Wood v. Wood, (Matter of Wood), 825 F.2d 90, 94 (5th Cir. 1987) ("To fall within the court's jurisdiction the plaintiffs' claims must affect the estate, not just the debtor."); Elscint, Inc. v. First Wisconsin Fin. Corp. Matter of Xonics, Inc.), 813 F.2d 127, 131 (7th Cir. 1987) (a related proceeding "affects the amount of property available for distribution or the allocation of property among creditors."); Marcus Dairy, Inc. v. Belford (In re Naugatuck Dairy Ice Cream Co., Inc.), 106 B.R. 24, 28 (Bankr. D.Conn. 1989). When property leaves the estate, the relation of a dispute involving that property to the bankruptcy case ends. In re Hall's Motor Transit Co., 889 F.2d 520, 523 (3rd Cir. 1989). The trustee's abandonment of the property eliminated any effect the avoidance of the IRS' lien would have had on the administration of the estate. As a consequence, this proceeding is not a related proceeding."

The Court is cognizant of the fact that the Debtors are proceeding pro se and that in this Circuit a trial court is under an obligation to "make reasonable allowances to protect pro se litigants from inadvertent forfeiture of important rights because of a lack of legal training". See Traguth v. Zuck, 710 F.2d 90, 95 (2nd Cir. 1983), citing inter alia Haines v. Kerner, 404, U.S. 519, 92 S. Ct. 594, 30 L.Ed 2d 652 (1972). The resolution of Debtors' longstanding dispute with Fleet/Norstar, however, will in no way, at this point, impact on their bankruptcy estate, and this Court cannot provide a forum to entertain this ongoing litigation simply

because the Debtors are unwilling or unable to retain counsel.

Thus, the Court concludes that it is without subject matter jurisdiction of this adversary proceeding and it has no choice but to dismiss it.

IT IS SO ORDERED.

Dated at Utica, New York

this day of 1995

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge